DEFENDERS OF APPALACHIA: THE CAMPAIGN TO ELIMINATE MOUNTAINTOP REMOVAL COAL MINING AND THE ROLE OF PUBLIC JUSTICE

BY

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This Comment examines the legal strategies and techniques utilized in a series of environmental lawsuits challenging mountaintop removal coal mining. This case study also explores the role that Public Justice plays in affecting positive change through public interest law. Many are unaware of both the devastation mountaintop removal coal mining causes in the Appalachians and the contributions of trial lawyers to public interest law. To shed light on both these issues, this Comment discusses the background of mountaintop removal coal mining and Public Justice, the history of litigation and legal strategies used to further the campaign against such devastating mining techniques, and the role of politics, policy, and publicity.

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I. INTRODUCTION

Flying over parts of the central Appalachian Mountains, the view below looks like a scene from the moon. Instead of noble stands of forest and tranquil streams, one finds a maze of roads and heaved earth with virtually all life obliterated. "You're seeing devastation . . . on a scale unprecedented in this country. The sheer destruction is mind boggling."[1] This shocking image is the product of a coal mining practice known as mountaintop removal. "If you are looking for the greatest amount of environmental destruction caused by a single type of activity in the country today . . . mountaintop removal coal mining in Appalachia would almost certainly get the prize."[2]

This Comment examines the legal strategies and techniques utilized in a series of environmental lawsuits challenging mountaintop removal coal mining. This case study also explores the role Public Justice (formerly Trial Lawyers for Public Justice) plays in affecting positive change through public interest law. Many are unaware of both the devastation in the Appalachians and the contributions of trial lawyers to public interest law. The aim of this Comment is to shed light on both these issues.

[1] *NOW: The Cost of Coal* (PBS television broadcast Aug. 2, 2002), *available at* http://www.pbs.org/now/transcript/transcript_coal.html [hereinafter *The Cost of Coal*].

[2] Telephone Interview with Jim Hecker, Dir., Envtl. Enforcement Project, Public Justice (Oct. 27, 2006) [hereinafter Interview with Jim Hecker I].

Part II of this Comment provides an introduction to mountaintop removal coal mining, and Part III summarizes the history, structure, and development of the organization Public Justice. Part IV describes the careers of two of the primary litigators involved in environmental lawsuits challenging mountaintop removal coal mining: Jim Hecker, director of the Environmental Enforcement Project at Public Justice, and Joe Lovett, founder and director of the Appalachia Center for the Economy and Environment. Part V details the history of litigation involved with this effort to stop mountaintop mining and Part VI offers an insight into the legal strategies these two attorneys have used to further this campaign. The remainder of the Comment considers the role of politics (Part VII), policy (Part VIII), and publicity (Part IX).

II. MOUNTAINTOP REMOVAL

Coal was discovered in the eastern United States soon after colonization, and large scale extraction commenced shortly thereafter.[3] Central Appalachia has always been a large producer of the country's coal and remains a major area for coal mining, currently second only to Wyoming's Powder River Basin.[4] Coal can be extracted via surface or underground mines.[5] While underground mines are still the most common form of coal mining in Appalachia, surface mining has grown considerably due to the practice of mountaintop removal—a type of strip mining that utilizes explosives to blast as much as 800 to 1,000 feet off of the tops of mountains to access underlying coal deposits.[6] "In the United States, one hundred tons of coal are extracted every two seconds. Around 70 percent of that coal comes from strip mines, and over the last twenty years, an increasing amount comes from mountaintop removal sites."[7] This technique uses a combination of ammonium nitrate and diesel fuel as the explosive—the same mixture used in the Oklahoma City bombing, except each blast is at least ten times more powerful and hundreds are set off each day.[8]

Mountaintop removal coal mining flourished in the 1990s. The technique became feasible with the development of gigantic earth-moving machinery in the 1960s and 1970s.[9] Its use expanded after amendments to the Clean Air Act[10] in 1990 established a trading and quota system for sulfur dioxide emissions, which encouraged coal burning plants to reduce their

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[3] *Id.*; *see also* National Energy Technology Laboratory, "History of Coal Use," http://www.netl.doe.gov/keyissues/historyofcoaluse.html (last visited July 15, 2007).

[4] Eric Reese, *Moving Mountains: The Battle for Justice Comes to the Coal Fields of Appalachia*, ORION MAGAZINE, Jan./Feb. 2006, *available at* http://www.orionmagazine.org/index.php/articles/article/166/Reese.html; *see also* Ken Ward Jr., *Coal Industry Competition Made Mines Bigger*, CHARLESTON SUNDAY GAZETTE-MAIL, June 6, 1999, *available at* http://www.wvgazette.com/static/series/mining/coal0606.html.

[5] Reese, *supra* note 4.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000).

sulfur emissions as much as possible.[11] Low-sulfur coal became very desirable and the coal industry began concentrating mining in areas where there were low sulfur coal deposits, chiefly in the Appalachian Mountains of West Virginia, Ohio, Kentucky, southern Virginia, and eastern Tennessee.[12] Surface mining techniques have been refined over the years and mountaintop removal mining has become the most efficient and profitable means of coal extraction,[13] but at the cost of being the most destructive mining practice. "[T]his is a method of coal mining where the entire tops of mountains are chewed up to remove the coal buried within them . . . .Whole mountains are being leveled."[14]

As the largest contiguous stand of forest in the eastern United States, the wooded mountains of central Appalachia constitute one of the most diverse and delicate ecosystems in the country.[15] The continued practice of mountaintop coal mining threatens a national treasure otherwise filled with breathtaking vistas and exceptional natural scenery. The mining process destroys hundreds of square miles of vibrant forest.[16] In addition, to minimize waste disposal costs, the byproduct of the blasts, known as "valley fill,"[17] is dumped into valleys, burying and choking hundreds of miles of streams in rubble and affecting thousands of miles of water downstream.[18] Coal companies "are dumping waste into valleys and destroying streams because it is the cheapest method, nothing more."[19] The mines and valley fill permanently damage the ecosystem and landscape, jeopardizing threatened and endangered fish and wildlife species.[20]

Mountaintop removal also harms the surrounding communities that have lived in the mountains for generations. Residents near mines suffer from "rock slides, catastrophic floods, poisoned water supplies, constant blasting, destroyed property, and lost culture."[21] The health implications are

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11 Coal plants emitting less than their allowance could sell what remained. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Title IV, § 401, 104 Stat. 2613 (codified as amended at 42 U.S.C. § 7651 (2000)); *see also* Jacob Kreutzer, *Cap and Trade: A Behavior Analysis of the Sulfur Dioxide Emissions Market*, 62 N.Y.U. ANN. SURV. AM. L. 125, 125–32 (2006).

12 Citizens Coal Council: Acid Rain Fact Sheet, http://www.citizenscoalcouncil.org/archive/facts/acidrain.htm (last visited July 15, 2007).

13 Sandi Zellmer, Center for Progressive Reform, Mountaintop Removal, http://www.progressiveregulation.org/perspectives/mt_top.cfm (last visited July 15, 2007).

14 Interview with Jim Hecker I, *supra* note 2.

15 *See generally*, R. F. Mueller, *Central Appalachian Forests: A Guide for Activists*, 4 WILD EARTH 37–49 (1994) (describing "unique biological communities" and "soil and forest types"), *available at* http://asecular.com/forests/activistguide.htm.

16 *See* Cindy Rank, *The Coal Truth: People, Water, Energy and Appalachia*, WATERKEEPER 26, 34 (Winter 2006) (noting that "[m]ountaintop removal mining has already turned hundreds of thousands of acres of Appalachia's mountains into barren wastelands").

17 Zellmer, *supra* note 13.

18 *Id.*

19 Telephone Interview with Joan Mulhern, Senior Legislative Counsel, Earthjustice (Nov. 2, 2006) [hereinafter Interview with Joan Mulhern].

20 Zellmer, *supra* note 13.

21 Earthjustice Policy and Legislation, A New Fight Against Mountaintop Removal Mining, http://www.earthjustice.org/our_work/policy/2005/bush_administration_promotes_mountaintop_removal_mining.html (last visited July 15, 2007) [hereinafter Earthjustice Policy and

alarming. In Rock Creek, West Virginia, the "coal dust settles like pollen" over the elementary school playground causing "fifteen to twenty students [to go] home sick every day because of asthma problems, severe headaches, blisters in their mouths, [and] constant runny noses."[22] Valley fills from the mines "leach poisonous heavy metals into the water supply," which "are poisonous to humans" in high enough concentrations.[23] Children near the Pine Mountain mine in Kentucky "suffer from an alarmingly high rate of nausea, diarrhea, vomiting, and shortness of breath—symptoms . . . that can be traced back to sedimentation and dissolved minerals that have drained down from mine sites into nearby streams."[24] The long term health effects have yet to be studied and may include "liver, kidney, and spleen failure, bone damage, and cancers of the digestive track."[25]

A frequent argument of the coal mining industry is that the mines provide jobs and are the foundation of local economies.[26] However, this is a fallacy. In reality, the emergence of mountaintop removal, utilizing explosives and large machinery, has greatly reduced the need for manual labor. Between 1990 and 1997, as mountaintop removal became widespread, the coal industry lost 10,000 jobs.[27] Additionally, coal mining fails to help the economy of the region. "[F]orty-one years after [President] Lyndon Johnson stood on a miner's porch . . . and announced his War on Poverty, the poverty rate in central and southern Appalachia stands at 30 percent," exactly where it was in 1964.[28] Moreover, areas where coal mining has ceased have seen economic improvement while regions where coal operations continue have seen economic strife.[29] Maps produced by the Appalachian Regional Commission reveal that the poorest and most distressed counties are those that have endured the most severe strip mining and mountaintop removal.[30]

By the numbers, the destruction in Appalachia is appalling. So far, over 300 square miles of forest have been decimated and over 1,200 miles of rivers and streams have been buried by mountaintop removal waste.[31] Moreover, thousands of miles of downstream waters have been polluted by mine sludge and toxic substances like arsenic, mercury, chromium, boron,

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Legislation].

[22] Alliance for Justice, Full Court Press Blog, http://fullcourtpressblog.blogspot.com/2006_03_01_archive.html (July 15, 2007).

[23] *Id.*

[24] Reese, *supra* note 4.

[25] *Id.*

[26] *Cf.* Reese, *supra* note 4.

[27] John McFerrin, *An Odd Partnership UMW, Coal Association Arm in Arm*, CHARLESTON GAZETTE, May 21, 1999, at P5A.

[28] Reese, *supra* note 4.

[29] *Id.*; *see also* Telephone Interview with Joe Lovett, founder and director, Appalachia Center for the Economy and Environment (Oct. 30, 2006) [hereinafter Interview with Joe Lovett]; *see generally* Diane McLaughlin, Dan Lichter & Stephan Mathews, Demographic Diversity and Economic Change in Appalachia, Population Research Institute, Pennsylvania State University (1999), *available at* http://www.arc.gov/images/reports/demographic/demographics.pdf.

[30] McLaughlin, *supra* note 29.

[31] Earthjustice Policy and Legislation, *supra* note 21.

selenium, and nickel.[32] The valley fills have caused devastating storm runoff problems, and in 2001 alone 500 West Virginia homes near valley fills were destroyed by flooding.[33] In all, 1.4 million acres of the region's land, home to people and wildlife, have been impacted by mountaintop mining—constituting an area the size of Delaware.[34] In general, coal production generates more carbon dioxide than any other energy source, with crucial implications on human-induced climate change.[35] Burning coal spews mercury into the air which contaminates the skies and finds its way into water sources.[36] Furthermore, numerous other toxic pollutants are produced or are associated with coal extraction and burning.[37]

Mountaintop removal is governed by the Surface Mining Control and Reclamation Act (SMCRA).[38] States can issue mine permits through their federally approved program,[39] and West Virginia issues permits through the West Virginia Department of Environmental Protection (WVDEP).[40] The WVDEP is responsible for "regulat[ing] the mining industry in accordance with federal and state law."[41] However, when the waste or "overburden" of the mines is dumped into valleys containing streams, the Clean Water Act (CWA)[42] is implicated and federal regulation is required.[43] A separate permit is mandatory for these valley fills under section 404 of the CWA.[44] The U.S.

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[32] Press Release, Earthjustice, Cancer: Coal's Hidden Cost (Mar. 6, 2007), *available at* http://www.earthjustice.org/news/press/007/cancer-coals-hidden-cost.html.

[33] *See, e.g.*, Appalachia's Last Stand, Ohio Valley Environmental Coalition, http://www.ohvec.org/issues/mountaintop_removal/articles/appalachias_last_stand.pdf (referring to a single flooding for which coal companies were held partly liable).

[34] Union of Concerned Scientists, Further Investigation of the Bush Administration's Misuse of Science 8 (July 2004), *available at* http://www.ucsusa.org/assets/documents/scientific_integrity/Scientific_Integrity_in_Policy_Making_July_2004_1.pdf) (citing EPA, 2003 Draft Programmatic Environmental Impact Statement (EIS) on Mountaintop Mining).

[35] *See, e.g.*, Dep't of Energy, Carbon Dioxide Emissions from the Generation of Electric Power in the United States 3 (July 2000), *available at* http://www.eia.doe.gov/cneaf/electricity/page/co2_report/co2emiss.pdf ("CO2 emissions from coal-fired electricity generation comprise nearly 80 percent of the total CO2 emissions produced by the generation of electricity in the United States.").

[36] Frank O'Donnell, Heavy Metal Holdup (Sept. 8, 2005) http://www.tompaine.com/articles/2005/09/08/heavy_metal_holdup.php (last visited July 15, 2007); Avi Brisman, *The Aesthetics of Wind Energy Systems*, 13 N.Y.U. ENVTL. L.J. 1, 30 (2005).

[37] *See, e.g.*, Clean Coal Technology: How It Works, BBC News (Nov. 28, 2005) http://news.bbc.co.uk/2/hi/science/nature/4468076.stm (last visited July 15, 2007) (listing pollutants such as sulfur dioxide and nitrogen oxide); Lakshman Guruswamy, *Integrating Thoughtways: Re-opening of the Environmental Mind?*, 1989 Wis. L. Rev. 463, 472–73 (1989) (reporting that coal combustion results in the release of sulfur dioxide, oxides of nitrogen, particulates, and bottom ash).

[38] Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (2000).

[39] *Id.* § 1201(f).

[40] West Virginia Department of Environmental Protection, Division of Mining and Reclamation, http://www.wvdep.org/ (last visited July 14, 2007).

[41] *Id.* at Our Mission, Division of Mining and Reclamation, http://www.wvdep.org/item.cfm?ssid=9&ss1id=37 (last visited July 14, 2007).

[42] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

[43] *Id.* § 1344.

[44] *Id.*

Army Corps of Engineers (Corps) is the federal agency charged with issuing these permits.[45] More generally, the Environmental Protection Agency (EPA) administers and enforces the Clean Water Act.[46]

III. PUBLIC JUSTICE

A. Background

Public Justice is a national public interest law firm committed to creating a more just society through litigation and public education by utilizing trial lawyers' skills and resources, and is financially supported by the Public Justice Foundation (Foundation), a not-for-profit membership organization.[47] Public Justice was founded in 1982 as the Trial Lawyers for Public Justice, after Ralph Nader gave a speech to the Michigan Trial Lawyers Association in 1980 challenging the trial bar to create a public interest law firm that would bring cases to promote the public good, as opposed to making money.[48] A number of trial lawyers who heard Mr. Nader's speech were inspired—they organized, gathered support, and created Public Justice with Mr. Nader's vision in mind.[49]

The founding trial lawyers recognized it was necessary to create Public Justice to broaden the impact of public interest litigation.[50] At the time, damage litigation was rarely used in public interest lawsuits.[51] The primary method of public litigation was lawsuits for injunctive relief, mostly against the government and educational institutions.[52] At the time, the firms doing public interest litigation were large corporate law firms doing pro-bono work, as many public interest organizations did not have in-house litigators.[53] The pro-bono lawyers in the corporate firms would not sue corporate defendants for damages.[54] Trial lawyers, however, were willing to do so.

Moreover, many public interest lawyers who were independent from the corporate firms did not have the resources and skills to pursue damages litigation even if they wanted to.[55] Damages litigation requires a great deal of preliminary capital to conduct discovery and factually intensive case work-ups, and most public interest firms did not have sufficient staff or resources

45 *Id.*

46 *Id.* § 1251(d). The EPA also has veto authority over § 404 fill permits issued by the Corps. *Id.* § 1344(c).

47 Public Justice was known as Trial Lawyers for Public Justice until January 31, 2007; *see also* Public Justice, Welcome!, Public Justice, http://www.tlpj.org (last visited July 15, 2007).

48 Telephone Interview with Arthur Bryant, Executive Director, Public Justice (Nov. 15, 2006) [hereinafter Interview with Arthur Bryant].

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 Interview with Jim Hecker I, *supra* note 2.

55 *Id.*

to do so.[56] Trial work for damages also requires a separate skill set that public interest lawyers did not develop in claims for injunctive relief.[57] Thus, many public interest lawyers shied away from fact-intensive trials they could not litigate effectively, or afford, and focused on motions for summary judgment and other legal arguments with which they were better accustomed.[58] Trial lawyers, on the other hand, had the financial resources and litigation skills many public interest lawyers lacked.[59] The founders of Public Justice recognized that damages litigation could produce extensive social change and advance a new model of public interest litigation that functions in concert with other public interest lawyers working toward the same social goals.[60]

B. Public Justice Today

Public Justice was founded by an initial membership of 200 trial lawyers.[61] Originally, the founders believed each member would contribute a one-time donation and that Public Justice would become self-sufficient, developing an operating budget from attorney fees earned from successful lawsuits. But Public Justice quickly needed additional financial support to survive and instead switched to a system of annual memberships and other donations.[62] Public Justice's current membership of 3,500 consists of attorneys as well as other concerned citizens.[63] Yearly, Public Justice members donate anywhere from $25 to $25,000 to the Foundation; these donations support Public Justice's litigation projects.[64]

Today, through the support of its members, Public Justice is able to promote its goal of affecting positive social change through litigation on a large scale. As Public Justice has grown, so has the wide range of issues that the firm litigates. Yet Public Justice's litigation continues to contain the common theme of utilizing the skills of its attorneys in precedent-setting litigation.[65] At the same time, Public Justice's methods have changed. While Public Justice continues to bring damages litigation, a majority of its cases are now based upon claims for injunctive relief. Further, although Public Justice litigates many cases independently, it has

56 *Id.*

57 *Id.*

58 Interview with Arthur Bryant, *supra* note 48.

59 *Id.*; *see also* Earthjustice, Trial Lawyers for Public Justice, http://earthjustice.org/about_us/clients_coalitions/trial_lawyers_for_public_justice.html (last visited July 15, 2007) (explaining that Trial Lawyers for Public Justice is dedicated to using the skills and resources of trial lawyers to advance the public good).

60 Interview with Arthur Bryant, *supra* note 48.

61 Public Justice, Overview of Public Justice and the Public Justice Foundation, http://www.tlpj.org/overview.htm (last visited July 15, 2007).

62 Interview with Arthur Bryant, *supra* note 48.

63 Public Justice, Join Us/Contribute, http://www.tlpj.org/join.htm (last visited July 15, 2007).

64 Interview with Arthur Bryant, *supra* note 48.

65 *Id.*

also reached out and joined forces with other public interest organizations in collaborative litigation.[66]

C. Justice and the Environment

Public Justice has litigated many environmental lawsuits through its Environmental Enforcement Project. Under the direction of Jim Hecker, Public Justice secured the largest consumer settlements ever received under the Clean Water Act in Tennessee,[67] Oklahoma,[68] Arkansas,[69] and Puerto Rico.[70] The law firm also obtained the largest consumer settlement ever obtained in New Jersey[71] and the first ever in Texas under the Clean Air Act.[72] Finally, Public Justice successfully litigated a number of other citizen suits to stop destructive mountaintop removal mining.[73]

The mountaintop removal cases are particularly important to Public Justice because, when all the environmental harms in the country are considered, it is one of the most egregious activities that Public Justice could stop by means of litigation.[74] The mountaintop removal cases demonstrate Public Justice's willingness to take on extremely difficult litigation in a hostile environment, and succeed. As Arthur Bryant comments, "Public Justice focuses on cases that advance the public interest, whether or not they make any money . . . . The reality is this litigation has made a huge difference already, against odds that have been enormously unfavorable."[75]

IV. BIOGRAPHIES

A. Jim Hecker

Jim Hecker has served as the Environmental Enforcement Director at Public Justice since 1990.[76] He has served as counsel on thirteen citizen suits brought under the Clean Water Act (several of which resulted in record-

66 *Id.*

67 Public Justice, Overview of Public Justice and the TLPJ Foundation, http://www.tlpj.org/overview.htm (last visited July 15, 2007).

68 *Id.*

69 Ark. Wildlife Fed'n v. Bekaert Corp., 791 F. Supp. 2d 769 (W.D. Ark. 1992).

70 P.R. Campers' Ass'n v. P.R. Aqueduct & Sewer Auth., 219 F. Supp. 2d 201 (D. P.R. 2002).

71 Overview of Public Justice and the TLPJ Foundation, *supra* note 67.

72 Texans United v. Crown Cent. Petroleum, 1998 U.S. Dist. LEXIS 16146 (S.D. Tex. 1998).

73 *See* Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D.W. Va. 1999) (discussed *infra* text accompanying notes 110–43); Kentuckians for the Commonwealth v. Rivenburgh, 206 F. Supp. 2d 782 (S.D.W. Va. 2002) (discussed *infra* text accompanying notes 144–69); Ohio Valley Envtl. Coal. v. Bulen, 315 F. Supp. 2d 821 (S.D.W. Va. 2004) (discussed *infra* text accompanying notes 170–81); Complaint for Declaratory and Injunctive Relief, Ky. Riverkeeper v. Rowlette, No. 05-36-JBC (E.D. Ky. Jan. 27, 2005) (discussed *infra* text accompanying notes 182–84).

74 Interview with Arthur Bryant, *supra* note 48.

75 *Id.*

76 Interview with Jim Hecker I, *supra* note 2.

setting settlements), ten citizen suits brought under other federal environmental statutes, and twelve lawsuits against government agencies under environmental statutes.[77] Many of the lawsuits he has worked on at Public Justice have set important precedents. For example, Hecker brought the first case holding that EPA administrative compliance orders do not preclude citizen suits.[78] Often, lawyers with compelling cases but not enough resources or skills come to him requesting help, which is precisely how he became involved in the mountaintop removal litigation.[79]

In late 1998, Hecker received a call from Joe Lovett, an attorney who had a great case that nobody else would help him with. After Hecker investigated the matter, he determined it was a case that just "screamed for legal help."[80] Hecker reflects, the "facts . . . were so outrageous," it was not hard to recognize that Public Justice had to do something.[81]

B. Joe Lovett

Joe Lovett is the Executive Director and founder of the Appalachian Center for the Economy and the Environment in Lewisburg, West Virginia.[82] He has served as legal counsel in precedent-setting cases challenging mountaintop removal coal mining, including *Bragg v. Robertson*[83] and *Kentuckians for the Commonwealth v. Rivenburgh*.[84] He has also contributed to other legal challenges resulting in millions of dollars added to the West Virginia Coal Mining Special Reclamation Fund.[85]

Lovett has a passion for nature and specifically, the natural beauty of the Appalachian Mountains.[86] Lovett was drawn to the mountaintop removal cases by fate. Despite growing up in West Virginia, he had no connection to the coal mining industry and had never been on a coal mine prior to starting his legal work on mountaintop coal mining.[87] His first client while working at Mountain State Justice, a non-profit legal services program in Charleston, West Virginia, was James Weekley, a disabled miner whose home was below the proposed Spruce Creek Mine.[88] Arch Coal Company had already mined a nearby ridge for the previous six years.[89] The blasting, noise, and dust had

77 *Id.*

78 Ark. Wildlife Fed'n v. Bekaert Corp., 791 F. Supp. 2d 769 (W.D. Ark. 1992).

79 Interview with Jim Hecker I, *supra* note 2.

80 *Id.*

81 *Id.*

82 Appalachian Center for the Economy & the Environment, About the Center, http://www.appalachian-center.org/about/index.html#staff (last visited July 15, 2007) [hereinafter Appalachian Center].

83 248 F.3d 275 (4th Cir. 2001).

84 317 F.3d 425 (4th Cir. 2003); Appalachian Center, *supra* note 82.

85 Appalachian Center, *supra* note 82.

86 Interview with Joe Lovett, *supra* note 29.

87 *Id.*

88 Rudy Abramson, Alicia Patterson Found., *A Judge in Coal Country*, 20 APF REP., Issue 3, 2002, *available at* http://www.aliciapatterson.org/APF2003/Abramson/Abramson.html.

89 *Id.*

driven away much of the community and many of the businesses.[90] However, with the seams exhausted at this mine, Arch Coal Company had proposed a new project on the adjacent ridge, right above Weekley's home.[91] Reading a *U.S. News & World Report* article[92] about the mountaintop mining prompted Weekley to seek help. The article featured photographs of the mines and predicted that half the mountain peaks across a section of southern West Virginia would be gone in twenty years.[93] Arch Coal Company expected to remove two billion dollars of coal over a period of fifteen years at the proposed Spruce Mine.[94] Weekley came into Lovett's office and described the destruction and harm the mountaintop mines were causing and asked what could be done to protect his home.

Lovett accepted the case, and subsequently visited one of the mountaintop removal sites. When he saw the devastation mountaintop mining was causing to the Appalachia environment, he was shocked. Lovett set out to initiate change to stop this practice. On July 16, 1998, *Bragg v. Robertson*[95] was filed and Public Justice's campaign to end mountaintop removal mining was born.

At the time, many West Virginians did not know about the destruction and harm being caused by mountaintop coal mining.[96] The citizens remained largely uninformed because the coal companies attempted to keep their aesthetically displeasing mountaintop removal operations hidden from the public.[97] For example, a traveler on the main roads in Appalachia would not see any alterations to the landscape. However, if one were to leave the main roads, and look over the next ridge, one would see unimaginable destruction. Thus, the only people who knew about the devastation were the citizens who actually lived near these locations.

While Lovett was committed to the cause, he quickly discovered it was almost impossible for one person to challenge the coal mining industry alone. Since Mountain State Justice was unable to provide support staff, Lovett quickly realized he needed outside help. He recalls calling everybody he knew to ask for assistance but initially had no success. Most people told him they were too busy or did not find the issue worth pursuing. However, things changed when he contacted Hecker. Hecker was easily convinced to start working on the issue and their partnership has since flourished as they have subsequently worked on several more mountaintop coal mining cases together.[98]

The support from Public Justice was vital and its assistance continues to be extremely important. Lovett calls Hecker "a great lawyer with

90 *Id.*

91 *Id.*

92 Penny Loeb, *Shear Madness*, U.S. NEWS & WORLD REPORT, Aug. 11, 1997, at 26.

93 *Id.* at 28.

94 *Id.*

95 54 F. Supp. 2d 635, 638 (S.D.W. Va. 1999).

96 Interview with Joe Lovett, *supra* note 29.

97 *Id.*

98 *Id.*

incredible experience."[99] Lovett explains: "[Hecker] gave me the confidence to do things. I initially had no grounding or sense of how to attack the problem. He provided the grounding and was very important to getting this legal campaign off the ground."[100] For instance, when they brought their first case, *Bragg v. Robertson*, Lovett recalls that he "naively believed that we would just go to court, point out what was wrong and that the United States government would fix it. But it hasn't."[101] The campaign has proven to be much more complex than Lovett originally imagined, and Hecker's expertise with citizen suits arising under the CWA have proven invaluable.

Furthermore, Earthjustice, which has been a consistent supporter of eliminating mountaintop mining, continues to provide policy and legislative support along with funding to hire experts at trials.[102] From early on, Earthjustice attorney Joan Mulhern has been an especially important participant in the movement—tackling the policy and legislative issues in Washington D.C. Recently, Earthjustice began participating in litigation, becoming co-counsel with Lovett in a trial in October 2006.[103]

As he became more focused on the issue of mountaintop mining, Lovett decided to create his own organization dedicated to this mission. Thus, in 2001, he formed the Appalachian Center for the Economy and the Environment (Appalachian Center) in Lewisburg, West Virginia. The formal mission of the Appalachian Center is three-fold:

1. Protect Appalachian communities and the natural environment that supports them by enforcing and strengthening state and federal environmental laws and by forcing the region's extractive and polluting industries to internalize their costs;
2. Revitalize Appalachian communities by helping to develop and implement an environmentally responsible, sustainable economy in the region; and
3. Conserve and restore the wilderness for the common benefit of the people who live in and enjoy the region's forests, streams, rivers and mountains.[104]

Appalachian Center's ultimate goal is to stop the extraction, use, and burning of coal as an energy source.[105] The Appalachian Center will attempt to spur and encourage the transition from coal to more responsible energy sources until "a sane political climate . . . return[s] and Congress can . . . be persuaded to ban all forms of mountaintop mining and initiate a program to

99 *Id.*

100 *Id.*

101 Interview with Joe Lovett, *supra* note 29.

102 *See* Earthjustice Policy and Legislation, *supra* note 21 (urging Earthjustice members to support the fight against mountaintop removal mining).

103 *Id.*; Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs, 479 F. Supp. 2d 607, (S.D. W.Va. 2007).

104 Appalachian Center, *supra* note 82.

105 *See generally id.* (discussing the purposes of the Appalachian Center, stating "we seek to start the long process of replacing the shortsighted economic policies of the region with more sustainable and responsible policies . . . [t]he Center is working to stop mountaintop removal coal mining").

penalize the burning of coal."[106] At a broad level, Lovett hopes the Appalachian Center's efforts and the coal mining cases will begin addressing the problem of human-induced climate change, which he views as "the most pressing issue of our time."[107]

V. LITIGATION HISTORY

A. Bragg v. Robertson

Bragg v. Robertson was filed on July 16, 1998 seeking declaratory and injunctive relief against two principal defendants, Michael Miano, the Director of the West Virginia Department of Environmental Protection, and Colonel Dana Robertson of the U.S. Army Corps of Engineers.[108] The complaint alleged Miano violated the buffer zone rule under SMCRA when he "abdicated his responsibilities to withhold approval of permit applications that will result in unlawful disturbances to 100-foot buffer zones around streams, destruction of riparian vegetation, violations of the requirement to restore mined and reclaimed areas to their approximate original contours, and improper post-mining land uses."[109] The complaint also alleged that Robertson violated the Environmental Impact Statement (EIS) requirement of the National Environmental Policy Act (NEPA)[110] and the individual permit requirement of the CWA "by failing to prepare an [EIS] on the Spruce Fork mine," and because he "intends to, and will, violate § 404 by failing to require [Arch Coal Company] to apply for an individual permit for the valley fills associated with that mine."[111]

The plaintiffs in *Bragg* alleged the Corps routinely violated its duty under SMCRA, the CWA, and NEPA, causing great environmental harm to the mountaintop ecosystem.[112] The complaint alleged the Corps also routinely failed to review permit applications and as a result granted permits to companies whose applications clearly violated the statutory schemes.[113] Further, they alleged that the Corps routinely failed to conduct the required EIS studies for permit applications.[114] The lack of review and findings was so severe that one permit reviewer assessed and approved 8,000 mining permits, without conducting the required investigation.[115]

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106 Interview with Joe Lovett, *supra* note 29.

107 *Id.* Others have also noted the importance of global warming. Calvin B. DeWitt, *Climate Care*, BANNER, Apr. 2007, at 17 (asserting "[h]uman induced climate change is a moral, ethical, and religious issue" and one "of the most pressing threats to our planet").

108 Second Amended Complaint for Declaratory Judgment and Injunctive Relief at 1, Bragg v. Robertson, 83 F. Supp. 2d 713 (S.D. W.Va. 1998) (No. 98-0636), 1999 WL 33933888.

109 *Id.*

110 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347, § 4332(2)(c) (2000).

111 Second Amended Complaint for Declaratory and Injunctive Relief, *Bragg*, 83 F. Supp. 2d 713 (No. 98-0636).

112 *Id.* ¶¶ 27–45

113 *Id.* ¶ 27.

114 *Id.* ¶ 4.

115 Deposition of Larry Alt, *Bragg*, 83 F. Supp. 2d 713 (S.D. W.Va. 1999).

The *Bragg* case was assigned to Judge Charles Haden II, Chief Judge of the U.S. District Court in Charleston.[116] A Republican and lifetime resident of West Virginia, Judge Haden had a reputation as a "strict constructionist" and lawyers for the defendants found his assignment to the case reassuring.[117] On December 22, 1998, a settlement was reached with the Corps requiring an EIS to identify ways to limit the harm caused by mountaintop removal and valley fills.[118] The Corps also agreed to stop issuing nationwide permits without individualized review of permit applications for projects with valley fills covering more than 250-acre watersheds and also to conduct the required EIS.[119] This "effectively changed the way the Corps was doing business," as it no longer rubber stamped every mining permit application.[120]

However, the Corps refused to include in the settlement agreement one of the largest mines in West Virginia, the Spruce Mine, due to pressure from the Arch Coal Company.[121] The plaintiffs refused to agree to this exception, instead asking the court to issue an injunction blocking the Spruce Mine permit.[122] In March 1999, Judge Haden issued a preliminary injunction blocking the mine.[123] Hecker believes this is the first such injunction issued in the history of SMCRA.[124] Shortly before trial began, the Corps abandoned the proposed permit.[125]

The *Bragg* plaintiffs settled most of their remaining claims against WVDEP in a consent decree requiring the agency to strengthen its permitting practices,[126] but they could not settle their claim concerning the stream buffer zone requirement. The plaintiffs submitted that claim to the court, and on October 20, 1999, Judge Haden issued a surprising ruling enjoining West Virginia from permitting any future filling of streams in violation of the buffer zone rule.[127] Judge Haden's order found that

> Valley fill waste disposal is a surface mining operation from which streams are protected . . . . The Director and his agents consistently admit that he made none of the required findings . . . the Director's legal rationales for failure to make the required buffer zone findings were inconsistent with the controlling statutes and regulations and relied on clearly erroneous interpretations of those laws . . . [and t]he Corps' § 404 authority to permit fills in the waters of the United States does not include authority to permit valley fills for coal mining waste disposal.[128]

116 Docket Report, Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D. W.Va. 1999) (No. 98-CU-00636).

117 Abramson, *supra* note 88.

118 Docket Report at entry 112, *Bragg*, 72 F. Supp. 2d 642 (No. 98-CU-00636).

119 Interview with Jim Hecker I, *supra* note 2.

120 *Id.*

121 *Id.*

122 *Bragg*, 72 F. Supp. 2d at 645.

123 Bragg v. Robertson, 54 F. Supp. 2d 635, 635 (S.D. W.Va. 1999).

124 Interview with Jim Hecker I, *supra* note 2.

125 *Id.*

126 *See generally Bragg*, 83 F. Supp. 2d 713 (S.D. W.Va. 2000).

127 *Bragg*, 72 F. Supp. 2d at 664.

128 *Id.* at 653, 657, 661.

Despite clear evidence that defendants were violating the explicit language of the statutes, even the attorneys thought obtaining the injunction would be difficult because an injunction would change the entire way the coal mining industry operated.[129] This was the first such injunction in the twenty-two-year history of SMCRA.[130] The Corps immediately requested an expedited trial on the merits. However, shortly before the trial began, the Corps abandoned the proposed nationwide permit for the Spruce Mine in a withdrawal letter that admitted the nationwide permit was legally indefensible.[131]

Judge Haden's injunction and holdings were a shock to the coal industry and its supporters, who anticipated the court would decide in favor of the coal industry.[132] The industry responded with scare tactics.[133] Former West Virginia Governor and coal company executive Cecil Underwood exaggerated that the decision was "a potential death sentence for coal mining" and froze state spending.[134] Mining companies laid off workers, claiming that without any documented support further mining in West Virginia was impossible and they would be forced to go out of business.[135]

Politicians responded to the ruling and coal industry's strategy. West Virginia's Congressional Representatives, who were all Democrats, voiced unified opposition to the ruling. Senator Byrd (D-W. Va.) even initiated an amendment to exempt mountaintop removal coal mining from the CWA and surface mining law's limits on stream destruction.[136] On November 18, 1999, the Senate voted for the amendment 56-33, but the House of Representatives refused to take up the issue.[137]

At the same time, defendants in *Bragg* and the coal industry appealed Judge Haden's decision to the Fourth Circuit Court of Appeals, changing the name of the case to *Bragg v. West Virginia Coal Miners Association*.[138] The Fourth Circuit reversed Judge Haden's buffer zone injunction on April 24, 2001, holding that a federal judge did not have the authority to issue an injunction against state officials (WVDEP and West Virginia Department of Environmental Protection Director Miano) because doing so violated the Eleventh Amendment.[139] At the same time, however, the court affirmed the preexisting settlements with the federal and state government over the objection of the coal industry.[140]

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129 Interview with Jim Hecker I, *supra* note 2.

130 *Id.*

131 *Id.*

132 *See* Francis X. Clines, *Environmentalists Warn Clinton of Reversal on Strip Mining*, N.Y. TIMES, Apr. 13, 2000, at A29.

133 *Id.*

134 Abramson, *supra* note 88.

135 Francis X. Clines, *Judge Takes on the White House on Mountaintop Mining*, N.Y. TIMES, May 19, 2002, at A18.

136 S. Amendment 2780 to H.R. J. Res. 82 (introduced Nov. 18, 1999).

137 U.S. PUB. INTEREST RESEARCH GROUP, CONGRESSIONAL SCORECARD 2000, at 6 (Rick Trilsch ed. 2000), *available at* http://www.pirg.org/score2000/national_scorecard.pdf.

138 248 F.3d 275 (4th Cir. 2001).

139 *Id.* at 296–97.

140 *Id.*

B. Kentuckians for the Commonwealth v. Rivenburgh[141]

Much of the recent litigation revolves around the Corps issuance of Nationwide Permits (NWPs) and NWP 21 in particular.[142] NWPs are general, five-year-long, country-wide authorizations, which require minimal inquiry into environmental impacts.[143] Thus, if a mining company is issued a NWP, it does not have to apply for individual mine permits, nor does the Corps have to investigate or analyze the environmental impact of each individual mine constructed under the permit.[144] Under the CWA, nationwide permits can only be issued for mining activities that have "minimal adverse environmental effects."[145] According to Alan Banks, Executive Director of Kentucky Riverkeeper, "the NWP 21 program was meant for activities that have only minimal adverse environmental effects, both individually and cumulatively."[146] According to Lovett, in the case of mountaintop removal, "[v]alley fills are so damaging that the Corps must use individual permits, not NWP 21. Individual permits under the Clean Water Act can only be issued after careful scientific review and public comment, which the Corps has evaded by using NWP 21."[147] However, the Corps routinely issues NWPs in violation of the CWA when it approves NWPs for mining operations that will bury miles of streams with valley fills, which would presumably have significantly more than "minimal adverse environmental effects."[148]

On August 21, 2001, Hecker and Lovett filed a new complaint in *Kentuckians for the Commonwealth v. Rivenburgh*, challenging the dumping of mining waste in streams under the CWA and its regulations.[149] Following the Fourth Circuit's holding in *Bragg*, only federal officers (the Corps) were named as defendants.[150] The complaint sought injunctive and declaratory relief regarding a mining permit issued by the Corps under NWP 21 permitting Martin Coal to create twenty-seven valley fills and to "fill over six

141 206 F. Supp. 2d 782 (S.D. W.Va. 2002).

142 *See* Ohio Valley Envtl. Coal. v. Buten, 429 F.3d 493 (challenging the Corp's authority to promulgate NWP 21) (4th Cir. 2005); Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 453 F. Supp. 2d 116 (D.D.C. 2006) (challenging NWPs issued by the Corps); Nat'l Wildlife Fed'n v. Brownlee, 402 F. Supp. 2d 1 (D.D.C. 2005) (challenging issuance of a NWP and failure to consult with the Fish and Wildlife Service under ESA).

143 33 U.S.C. § 1344(e)(1) (2000).

144 *See id.* (discussing the availability of general permits, which are an alternative to the individual permits authorized by 33 U.S.C. § 1344(a)).

145 *Id.* § 1344(e)(1) (2000).

146 Press release, Kentucky Riverkeeper, Kentucky Groups sue U.S. Army Corps of Engineers for Permitting Coal Companies to Destroy More Than 35 Miles of Kentucky Streams (Jan. 27, 2005), http://www.appalachianstudies.eku.edu/Kyriverkeeper/PressRelease/ (last visited July. 15, 2007) (emphasis omitted).

147 *Id.*

148 *See, e.g.*, *id.* (describing how the Corps, in the three years prior to 2005, "rubber-stamped more than 50 permits for 191 valley fills that [would] destroy more than 35 miles of Kentucky's streams").

149 Complaint, Kentuckians for the Commonwealth v. Rivenburgh, 206 F. Supp. 2d 782, 782 (S.D. W.Va. 2001).

150 *Id.*

miles of streams in Martin County, Kentucky with waste rock and dirt from surface coal mining activities."[151] The plaintiffs prayed for an order "(1) prohibiting the Corps from authorizing any activities that will dispose of waste rock from surface coal mining activities in waters of the United States; and (2) requiring the Corps to revoke [Martin Coal's] authorization pursuant to NWP 21."[152]

The Corps approved the Martin Coal permit based on regulations that permit disposal of "fill material" into streams under § 404 of the CWA.[153] Hecker and Lovett argued the valley fills were not "fill material" as contemplated by §404 of the CWA, but rather were "waste," which was excluded from the Corp's discretionary regulation. The complaint alleged interpreting twenty-seven valley fills as "fill material" instead of waste violates the clear intent of the CWA "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[154]

As Judge Haden was drafting his opinion, the Bush administration changed the CWA rules to allow mining waste dumps in streams on May 3, 2002.[155] The new rule clarified that valley fills were fill material as contemplated by the CWA.[156] Judge Haden responded on May 8, 2002, enjoining the Corps from permitting waste disposal in streams and finding the new rule promulgated by the Bush Administration to violate the CWA.[157] Judge Haden found "the agencies' proposed rule was contrary to the spirit and letter of the CWA, inconsistent with the statutory scheme, and therefore ultra vires."[158] On May 8, 2002, Representatives Shays (R-Conn.) and Pallone (D-N.J.) introduced the "Clean Water Protection Act" to overturn the Bush administration's change to the CWA rules.[159]

On January 29, 2003, the Fourth Circuit once again reversed Judge Haden's district court injunction in *Kentuckians for the Commonwealth v. Rivenburgh*.[160] The court validated the Corps' determination that mountaintop waste used to fill valleys was not pollutant waste in the sense of the garbage, sewage, and effluent contemplated by Congress when it

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151 Plaintiff's Memorandum in Support of its Motion for Summary Judgment and a Permanent Injunction on Count 1 at 1–2, Kentuckians for the Commonwealth v. Rivenburgh, 269 F. Supp. 2d 710 (S.D. W.Va. 2003) (No. 01-CV-770).

152 *Id.* at 2.

153 *Id.* at 3, 6–7.

154 Plaintiff's Memorandum in Support of its Motion for Summary Judgment and a Permanent Injunction on Count 1 at 6–7, 10–11 (citing intent of the CWA at 33 U.S.C. § 1251(a) (2000)).

155 Proposed Revisions to the Clean Water Act Regulations Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,295–96 (proposed Apr. 20, 2000) (to be codified at 33 C.F.R. 323.2(e) & 40 C.F.R. 232.2).

156 *Id.*

157 Kentuckians for the Commonwealth v. Rivenburgh (*Kentuckians I*), 204 F. Supp. 2d 927, 946 (S.D. W.Va. 2002).

158 Kentuckians for the Commonwealth v. Rivenburgh, 206 F. Supp. 2d 782, 791 (S.D. W.Va. 2002) (summarizing holding of *Kentuckians I*, 204 F. Supp. 2d at 945–46).

159 H.R. 4683, 107th Cong. (2002) (redefining the term "fill material" in the CWA to exclude "any pollutant discharged into the water primarily to dispose of waste").

160 317 F.3d 425 (4th Cir. 2003).

enacted the CWA.[161] The court held that because the CWA did not specify a definition for "fill material," the agency was entitled to deference in its interpretation under the original statute.[162] The Fourth Circuit also decided Judge Haden's ruling was beyond the scope of the issue before the court because "[n]one of the parties sought a declaration that the New Rule was illegal or inconsistent with the Clean Water Act."[163] On those grounds, the Fourth Circuit vacated his holding: "[b]ecause the district court reached beyond the issues presented to it . . . we vacate its ruling declaring the New Rule to be inconsistent with § 404 of the Clean Water Act."[164]

In response, Representative Shays and Pallone reintroduced the "Clean Water Protection Act" on February 12, 2003.[165] Unfortunately, due to the political climate there was insufficient support in both houses to pass the bill, let alone withstand a veto from President Bush.[166]

C. Ohio Valley Environment Coalition v. Bulen

On October 23, 2003, the attorneys filed a complaint in another case, *Ohio Valley Environmental Coalition v. Bulen*,[167] challenging NWP 21 as a violation of the CWA, and for the Corps' failure to prepare an EIS, as required by NEPA.[168]

In response, the Corps argued the EIS was unnecessary because the Corps had conducted an ex-post study which found the NWP program "will not have significant individual or cumulative adverse effects on the quality of the human environment."[169] According to the complaint, "[the Corps'] conclusion is inconsistent with the overwhelming weight of scientific evidence and is clearly erroneous."[170]

Plaintiffs further alleged the Corps acted arbitrarily and capriciously when it granted permits under NWP 21 because the activities permitted "will result in the destruction of hundreds of miles streams, and hundreds of thousands of acres of forests, the adverse effects [of which] are necessarily more than minimal."[171] Moreover, the Corps "abandoned the 250-acre threshold adopted in the Southern District of West Virginia in the Bragg settlement agreement without any data or other information showing that

161 *Id.* at 448.

162 *Id.* at 442–44.

163 *Id.* at 438.

164 *Id.*

165 H.R. 738, 108th Cong. (2003) (proposing an identical definition of "fill material" as in H.R. 4683, *supra* note 159).

166 *See* GovTrack.us, H.R. 738 [108th]: Clean Water Protection Act, http://www.govtrack.us/congress/bill.xpd?bill=h108-738 (last visited July 15, 2007) (indicating the bill never became law); *see infra* Parts VII a–b (discussing further the impact of politics on mountaintop removal litigation).

167 315 F. Supp. 2d 821 (S.D. W.Va. 2004).

168 Complaint for Declaratory and Injunctive Relief, Ohio Valley Envtl. Coal. v. Bulen, 410 F. Supp. 2d 450 (S.D. W.Va. 2004) (No.Civ. A.3: 03-2281).

169 *Id.* ¶ 33.

170 *Id.* ¶ 42.

171 *Id.* ¶ 22.

valley fills larger than 250 acres will not have more than minimal adverse environmental impact."[172]

On July 8, 2004, Clinton-appointed U.S. Federal District Judge Joseph Goodwin enjoined the Corps from using NWP 21 to permit valley fill in streams.[173] The court found the Corps' issuance of NWP 21 incompatible with the language, structure, and legislative history of the CWA, and accordingly ordered the Corps to suspend the eleven challenged authorizations.[174] Specifically, the court ruled that although the statute required the Corps to make a pre-issuance determination after public comment that NWP 21's impact was minimal across the board, the Corps instead relied on a post-issuance procedure, without any opportunity for public comment, to determine on an *ad hoc* basis that each site-specific authorization would have minimal effects.[175] Nevertheless, on November 23, 2005, the Fourth Circuit Court of Appeals once again reversed the district court, holding the Corps could "rely in part on post-issuance procedures to make its pre-issuance minimal impact determinations," even though the public has no right to participate in those post-issuance procedures.[176] The court remanded the case to the district court without ruling on the plaintiffs' remaining claims regarding NWP 21.[177] On February 15, 2006, the Fourth Circuit refused to grant the plaintiffs an en banc rehearing in a 5-3 decision.[178]

D. Kentucky Riverkeeper v. Rowlette[179]

To extend their initial successes in the *Bulen* case in West Virginia to Kentucky, Hecker and Lovett filed a case against the state's three Army Corps of Engineers Districts.[180] This case raises claims against the Corps's use of NWP 21 in Kentucky, where the Corps had used it to authorize the burial of over thirty-five miles of streams with valley fills.[181] Now that the Fourth Circuit has reversed the district court ruling in *Bulen*, a favorable ruling in *Kentucky Riverkeeper* could create a split in the circuits that could potentially induce the Fourth Circuit to reconsider its position.

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172 *Id.* ¶ 44

173 *Ohio Valley Envtl. Coal.*, 410 F. Supp. 2d at 471.

174 *Id.* at 453, 471.

175 *Id.* at 466; *see also* Ken Ward, Jr., *Mountaintop Removal Fight Returns to Appeals Court*, CHARLESTON GAZETTE, Sept. 18, 2005, *available at* http://www.appalachian-center.org/media/2005/09_18.html.

176 Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493, 505 (4th Cir. 2005).

177 *Id.*

178 Ohio Valley Envtl. Coal. v. Bulen, 437 F.3d 421, 421 (4th Cir. 2006).

179 Complaint for Declaratory and Injunctive Relief, Kentucky Riverkeeper v. Rowlette, No. 05-36-JBC (E.D. Ky. Jan. 27, 2005).

180 *Id.*

181 *Id.*

VI. LEGAL STRATEGY

Principally, Hecker and Lovett bring legal challenges they can likely win. The immediate goal is to obtain declaratory judgments and injunctions that stop destructive mining practices. Their long-term goal, however, is to compel the state and federal governments to follow the law.[182] Lovett emphasizes that they also seek to bring cases that they care about and can argue with passion and conviction.[183]

They believe mountaintop removal litigation is necessary because the agencies that are supposed to regulate mining are taken captive by the coal industry.[184] Instead of following the law, these agencies have caved to corporate money and influence.[185] "The Clean Water Act is supposed to protect the integrity of the nation's waters, not destroy it. And I can't think of any practice that's more destructive than filling streams beneath hundreds of millions of tons of mining waste."[186] Thus, another purpose of the litigation is to serve as a counterweight to corporate power and hold the agencies accountable to the public—their true constituency.[187]

A. Agency Resistance

If the agencies and industry simply followed the rules that were in place at the time of the litigation, the reckless destruction and pollution of the Appalachian environment and culture would not be so severe.[188] Existing statutory protections, including the CWA and surface mining laws, adequately protect the mountains, forests, and streams of Appalachia.[189] Hecker notes that the coal industry violates six different statutes and rules by blowing up the Appalachian Mountains.[190] Lovett contends the source of the problem lies in the government's refusal to enforce these existing laws in the face of pressure from the coal industry.[191] Hecker notes "[t]here is a consistent pattern that government regulators and enforcers let large numbers of serious violations go unpunished and uncorrected."[192]

Lovett never believed he would encounter so much governmental resistance in the face of statutes that seem so clear. He admits,

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182 Jim Hecker, Dir. of Envtl. Enforcement Project, Trial Lawyers for Public Justice, Speech at Vermont Law School (2001) (on file with author).

183 Interview with Joe Lovett, *supra* note 29.

184 Interview with Jim Hecker I, *supra* note 2.

185 Interview with Joe Lovett, *supra* note 29.

186 *The Cost of Coal*, *supra* note 1.

187 Interview with Jim Hecker I, *supra* note 2; Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493, 496 (4th Cir. 2005).

188 Interview with Jim Hecker I, *supra* note 2.

189 Interview with Joe Lovett, *supra* note 29.

190 Interview with Jim Hecker I, *supra* note 2.

191 Interview with Joe Lovett, *supra* note 29.

192 Interview with Jim Hecker I, *supra* note 2.

> When we first brought [*Bragg*], I thought that it would be as simple as pointing out to the government that the law wasn't being enforced. It's turned out to be far from simple. The government instead of enforcing the law has done everything it can to contort the law and to misconstrue it to allow practices that continue to devastate and I was surprised by that.[193]

Moreover, Hecker notes that "almost every time the attorneys try and enforce the statutes and regulations via litigation, the agencies change the rules and eviscerate them in a way that benefits the coal industry."[194]

There are several instances where this has happened. One example is the turn of events during the *Rivenburgh* litigation, described above, when the Bush Administration redefined "fill material" in a rule under the CWA to accommodate coal companies' mountaintop removal practices.[195] More recently, in response to successful enforcement of the buffer zone rule, the Office of Surface Mining (OSM) proposed a new rule that would effectively gut the buffer zone rule.[196] Hecker notes that some state agencies have also changed state laws in response to litigation, reducing water quality standards to the benefit of the coal industry.[197]

B. Venue

Hecker and Lovett do not bring legal challenges in state court, instead focusing almost entirely on federal court.[198] Their reasons are multifaceted. First, the defendants in the mountaintop removal cases are officers of federal agencies, including the Corps and the Department of the Interior. Second, unlike state court judges, the federal judiciary is not an elected body and is therefore much more insulated from political pressures. Elected state judges are more likely to be partial and sympathetic to the coal mining industry.[199]

Some state judges have received substantial campaign contributions and support from the coal industry in order to get elected to their twelve-year terms.[200] In fact, according to Citizens for Clean Elections in West Virginia, since 1996, coal operators and industry leaders have given well over four million dollars to candidates running for governor, the Supreme Court, and legislative positions in West Virginia.[201]

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193 *The Cost of Coal*, *supra* note 1.

194 Interview with Jim Hecker I, *supra* note 2.

195 Kentuckians for the Commonwealth v. Rivenburgh, 204 F. Supp. 2d 927, 944 (S.D. W.Va. 2002).

196 According to Hecker, OSM proposed the rule without preparing an EIS. Hecker and Lovett submitted comments anyway, arguing the proposed rule could not be enacted without such an analysis. Interview with Jim Hecker I, *supra* note 2. The OSM agreed and is in the process of preparing the EIS before it reissues a proposed rule. *Id.*

197 Telephone Interview with Jim Hecker, Dir., Envtl. Enforcement Project at Pub. Justice, (Nov. 29, 2006) [hereinafter Interview with Jim Hecker II].

198 Interview with Jim Hecker I, *supra* note 2.

199 Interview with Joe Lovett, *supra* note 29.

200 *See also* Paul Nyden, *Coal Has Given Millions to Candidates, Report Says*, CHARLESTON GAZETTE, Nov. 27, 2005, *available at* http://www.wvoter-owned.org/news/2005/11_27.html.

201 *Id.*

C. Judicial Resistance

While it is arguable state judges are structurally predisposed to support the coal industry, Hecker and Lovett also encounter significant judicial resistance at the federal level. Hecker believes that, even though his legal theories and claims often rely on the plain language interpretations of federal statutes and regulations, the outcomes of those interpretations are often highly controversial from a political standpoint.[202] The success of the litigation "depends heavily upon the makeup of the courts and whether they give the attorneys an honest and straight shot at the legal issues."[203] Unfortunately, Hecker and Lovett have faced remarkable resistance from many judges.

Hecker notes that in these politically controversial cases, some federal judges may try to twist a statute to fit their own policy preference. He believes judges deciding first what the result should be and then interpreting the statute to fit that result is the essence of judicial activism. Three times federal district court judges have issued rulings based on the plain language of statutes and regulations that have the effect of disadvantaging the coal industry, and three times the Fourth Circuit has reversed those decisions.[204] In each appeal, two of the three judges on the panel were the same two conservative Republican appointees.

An example of the judicial activism Hecker has faced comes from a citizen suit he litigated under the CWA in the Eighth Circuit.[205] The defendant argued that an administrative order from the state precluded the citizen suit.[206] In that case, the judge held that an agency's prior issuance of an order assessing a one thousand dollar penalty precluded a citizen suit for penalties, despite the fact that the agency order was issued without the required notice or opportunity to comment.[207] The court went even further and held that Hecker's clients were also precluded from bringing a suit for an injunctive relief to block future violations of the statute.[208]

D. Citizen Suits

Even if appearing before an impartial judge, the nature of litigation presents particular challenges because every mountaintop removal lawsuit Hecker and Lovett bring is a citizen suit. The fundamental purpose of a

202 Interview with Jim Hecker I, *supra* note 2.

203 *Id.*

204 Bragg v. W. Va. Coal Assoc., 72 F. Supp. 2d 642 (S.D. W.Va. 1999), *rev'd* by *Bragg*, 248 F.3d 275 (4th Cir. 2001); *Kentuckians for the Commonwealth v. Rivenburgh*, 206 F. Supp. 2d 782 (S.D. W.Va. 2002), *rev'd* by *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003); Ohio Valley Envtl. Coal. v. Bulen, 315 F. Supp. 2d 821 (S.D. W.Va. 2004), *rev'd* by Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493 (4th Cir. 2005).

205 Ark. Wildlife Fed'n v. ICI Americas, Inc., 842 F. Supp. 1140 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995).

206 *Id.*

207 *Id.* at 1148–50.

208 *Id.* at 1150.

citizen suit is "to authorize citizens to enforce the mandatory requirements of those laws against any person when the government fails to do so."[209] According to Hecker, judges are not receptive to the relatively new idea of citizen suits, which in the past three decades have allowed the private enforcement of public laws, and instead prefer to adjudicate only private claims for money damages under long-established common law theories.[210] Hecker even encountered a judge who insisted he add a common law nuisance claim to a citizen suit he had filed[211] (the judge eventually ruled in Hecker's favor on both counts).[212]

Hecker opines that judicial disdain for citizen suits is associated with the increased appointments of conservative Republican judges since 1980.[213] An October 2004 study by the Environmental Law Institute found that appellate panels dominated by Republican appointees were six times more likely than appellate panels dominated by Democratic appointees to rule against plaintiffs in environmental cases.[214] Some conservative judges appear to believe the government and agencies know best, so they should enforce the law, not citizens.[215] Hecker believes attorneys "come in to court in a hole to start with" when they file citizen lawsuits; the judge wants to know why they are in court to enforce the law instead of the government.[216]

E. Standing Issues

In order to bring citizen suits, the plaintiffs must have standing to challenge the action or inaction of the responsible government or agency.[217] Heckler feels citizen suits never really took hold as an important part of the American legal system and Supreme Court decisions have limited citizen suits through standing decisions where it should have embraced them.[218] Justice Scalia, author of two important decisions restricting standing,[219] has led a conservative judicial campaign to reduce the impact of citizen suits.

The Supreme Court's decision in *Friends of the Earth v. Laidlaw Environmental Services* (*Laidlaw*)[220] in 2001, however, reaffirmed that

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209 James H. Hecker, *The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both?*, 8 NAT. RESOURCES & ENV'T 31, 31 (Spring 1994).

210 Interview with Jim Hecker I, *supra* note 2.

211 Ellis v. Gallatin Steel Co., 390 F.3d 461, 467 (6th Cir. 2004).

212 Interview with Jim Hecker I, *supra* note 2.

213 *Id.*

214 ENVIRONMENTAL LAW INSTITUTE, JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 8 (2004), *available at* http://www.endangeredlaws.org/pdf/JudgingNEPA.pdf.

215 *Id.*

216 *Id.*

217 U.S. Const. art. III (limiting judicial jurisdiction to cases or controversies); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1991).

218 Interview with Jim Hecker I, *supra* note 2.

219 *Defenders of Wildlife*, 504 U.S. at 555; Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 83 (1998).

220 528 U.S. 167, 190 (2001).

citizen suits still have a place in American jurisprudence. This significant victory for citizen suit standing, however, is potentially in jeopardy, as Chief Justice Rehnquist and Justice O'Connor, who were in the majority in *Laidlaw*, have been replaced by Chief Justice Roberts and Justice Alito.

Due to these plaintiff standing and citizen suit complexities, Hecker and Lovett spend time making sure their clients satisfy standing requirements. Lovett used to represent individual plaintiffs, but has recently moved away from individuals because of the harassment and humiliation these citizens have faced in their hometowns.[221] Lovett described some of his past individual clients as "walking targets in their community."[222] As a result, many citizens, who would otherwise become citizen plaintiffs, are deterred from voicing their opposition to the coal industry in their individual capacity.[223]

In response, Lovett began representing groups and coalitions of concerned citizens, rather than single individuals.[224] These groups and organizations are comprised of numerous individuals, none of whom are named as individual plaintiffs in the case. This strategy eliminates the intimidation and harassment that citizens who stand up to the coal industry face from angry community members.

F. Fourth Circuit Court of Appeals

While Hecker and Lovett's litigation strategy has proven successful at the federal district court level, the Fourth Circuit Court of Appeals has been comparatively hostile. In fact, the court has reversed all or part of each of their successful cases that have come before it.[225] Lovett feels the setbacks can be partially explained by the fact that the attorneys have "drawn the same panel in the Fourth Circuit every time, which is statistically almost impossible."[226] Five of the fourteen judges have repeatedly recused themselves from the cases due to conflicts of interest with the coal industry.[227] Consequently, the pool of judges to be drawn for the three-member panel in each case is considerably reduced.[228]

The result is that in each case they have argued before the court, two conservative judges, Judges Neimeyer and Luttig, have been panel members. Moreover, they have always been joined on their panel by another Republican-appointed judge. These judges have made the Fourth Circuit a

221 Interview with Joe Lovett, *supra* note 29.

222 *Id.*

223 *Id.*

224 *Id.*

225 *Bragg v. W. Va. Coal Assoc.*, 72 F. Supp. 2d 642 (S.D. W.Va. 1999), *rev'd* by *Bragg*, 248 F.3d 275 (4th Cir. 2001); *Kentuckians for the Commonwealth v. Rivenburgh*, 206 F. Supp. 2d 782 (S.D. W.Va. 2002), *rev'd* by *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003); Ohio Valley Envtl. Coal. v. Bulen, 315 F. Supp. 2d 821 (S.D. W.Va. 2004), *rev'd* by Ohio Valley Envtl. Coal. V. Bulen, 429 F.3d 493 (4th Cir. 2005).

226 Interview with Joe Lovett, *supra* note 29.

227 *Id.*

228 *Id.*

particularly antagonistic court for mountaintop removal challenges. In fact, after they argued their third case before Judges Niemeyer and Luttig in *Bulen*, Lovett was resigned to the fact that "[t]hey're going to find against us. I don't know how, but they'll do it."[229] Sadly, Lovett's prediction was correct.[230]

These struggles in the appellate process have been discouraging and frustrating, but Lovett points out that all was not lost in the Fourth Circuit Court of Appeals. As mentioned above, in *Bragg*, the court did affirm a consent decree with West Virginia and a settlement with the federal government even though the coal industry wanted the consent decree overturned. Furthermore, Lovett notes that many favorable decisions have not been appealed to the Court of Appeals and the positive rulings from these cases have been effectively carried out, enjoining numerous mine proposals and placing millions of dollars in the West Virginia Coal Mining Special Reclamation Fund to rehabilitate abandoned mines.

In an attempt to circumvent the problems in the Fourth Circuit, Hecker and Lovett petitioned for an en banc rehearing for *Ohio Valley Environmental Coalition v. Bulen* in February 2006.[231] This petition was denied in a 5-3 vote, but Lovett is optimistic because three members of the court vociferously dissented.[232] Dissenting Judge Robert King accused the three-judge panel of "render[ing] [the pertinent provision of the CWA] a nullity," and stated that "[t]his case is of exceptional importance to the nation and, in particular, to the states in the Appalachian region."[233] Lovett anticipates Judge King's dissent will raise the level of attention of all the Fourth Circuit judges regarding the issue of mountaintop coal mining.[234]

Lovett is also optimistic that the attorneys may have future success at the appellate level for several additional reasons. With the recent departure of Judge Michael Luttig from the court, at least Hecker and Lovett are assured a new panel for the next appeal. They have sought to avoid the Fourth Circuit Court of Appeals altogether by bringing a legal challenge in the region of the Sixth Circuit Court of Appeals in Kentucky. A divergent ruling on mountaintop coal mining in the Sixth Circuit would create a circuit split and would hopefully provide the impetus for the Fourth Circuit to reconsider their stance on the issue.

G. Funding

Hecker and Lovett are compensated for their work by the fee shifting provisions of federal environmental laws for some of their claims, and the

229 Michael Shnayerson, *The Rape of Appalachia*, VANITY FAIR MAGAZINE, May 2006, *available at* http://www.vanityfair.com/politics/features/2006/05/appalachia200605.

230 *Id.*

231 Ohio Valley Envtl. Coal. v. Bulen, 437 F.3d 421, 422 (4th Cir. 2006).

232 *Id.*; Alliance for Justice, *supra* note 22; Interview with Joe Lovett, *supra* note 29.

233 *Bulen*, 437 F. 3d at 423, 424; Alliance for Justice, *supra* note 22.

234 Interview with Joe Lovett, *supra* note 29.

Equal Access to Justice Act[235] for their claims under the Administrative Procedure Act.[236] Therefore, if Hecker and Lovett prevail in an action, the defendants pay their fees and costs. However, standing alone, the fee shifting provisions do not support the cost of the litigation, as payment is contingent on success. Moreover, while many of the cases against federal agencies are litigated mostly on the administrative record, Hecker and Lovett have occasionally been forced to expend significant sums of money for discovery, expert testimony, and complex trials.

Adequate funding is an essential part of their campaign. However, it is also one of the most difficult aspects of the Appalachian Center's efforts, which must raise money for both litigation and advocacy.[237] Acquiring funds on the litigation side has proven much easier. Public Justice has provided essential funding, support, and resources since inception of the campaign.[238] In addition, Earthjustice has also been an important contributor. Lovett acknowledges the funding and generosity from these organizations.[239] Public Justice and Earthjustice are both committed to continuing to support the litigation.[240]

Funding the advocacy efforts of the Appalachian Center has been a greater struggle.[241] The Appalachian region, particularly in West Virginia, has one of the lowest per capita income rates in the United States[242] and poverty levels are well above the national average.[243] As a result, the citizens are underserved and many of their complaints and concerns go unheard.[244] Most of the money in West Virginia is derived from extracting and polluting industries, principally coal, and many of the wealthy West Virginians who have the capability of making substantial contributions have "their hands in the muck," according to Lovett.[245] As a result, the Appalachian Center receives very few big contributions from citizens of West Virginia and instead obtains most of its advocacy funding from small donations in amounts of $25, $50, and $100.[246]

Furthermore, very little money has traditionally originated from national environmental organizations and foundations outside the region.[247] Lovett initially sought funding from many national groups, but virtually all of

235 5 U.S.C. § 504 (2000); 28 U.S.C. § 2412(d)(2) (2000).

236 5 U.S.C. § 504.

237 Interview with Joe Lovett, *supra* note 29.

238 *Id.*

239 *Id.*

240 *Id.*

241 *Id.*

242 U.S. CENSUS BUREAU, WEST VIRGINIA PEOPLE MAPSTATS (2007), *available at* http://www.fedstats.gov/qf/states/54000.html.

243 U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2006 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT (2006), *available at* http://pubdb3.census.gov/macro/032006/pov/new46_100125_01.htm.

244 Interview with Joe Lovett, *supra* note 29.

245 *Id.*

246 *Id.*

247 *Id.*

them waived him off.[248] He acknowledges he is not as successful at fundraising as he would like to be, and believes this is a consequence of the fact that, for most people, coal mining in the Appalachian Mountains is simply "off their radar screen."[249]

One of Lovett's biggest challenges is to convince people that the rich history, culture, and biodiversity of the Appalachian Mountain region are worth protecting. On a broader level, he seeks to inform people that the use of coal as an energy source in any capacity is negatively impacting the environment of this country and the planet. Fortunately, the fruits of his hard work and persistance are beginning to materialize. Some national environmental organizations, including the Sierra Club, are beginning to realize the gravity of the destruction and loss in Appalachia and are contributing funds to the advocacy campaign.[250]

H. Future Litigation

Hecker and Lovett plan to continue challenging mine permits.[251] They will likely work together on more mountaintop removal cases in the future, especially because the issues regarding NWP 21 remain outstanding.[252] They will also likely continue to challenge large individual mine permits. The strategy is "to take one step at a time and hope the planet survives" until people realize that change is needed.

There is a related issue to mountaintop coal mining on which the two hope to work: fighting the movement to build more coal-fired plants.[253] Many coal-fired plants built before 1977 have avoided installing the pollution controls required on newer plants.[254] Additionally, while under the recent Clean Air Interstate Rule[255] many of these older coal plants will be forced to install expensive scrubbers on their plant stacks to reduce pollution, coal companies may try to offset that cost by burning lower cost, high sulfur coal.[256] This demand will only work to intensify the effects on the streams in the Appalachian Mountains.

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248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.*

252 Interview with Hecker I, *supra* note 2.

253 *Id.*

254 *See* ENVTL. WORKING GROUP & U.S. PUB. RESEARCH GROUP, UP IN SMOKE: CONGRESS' FAILURE TO CONTROL EMISSIONS FROM COAL POWER PLANTS 9 (July 1999), *available at* http://www.ewg.org/book/export/html/7997 (reporting that when Congress passed the Clean Air Act in 1970, Congress exempted coal-fired plants, and thirty years later these plants are still operating without significant emissions regulations).

255 Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (Apr. 4, 2007) (to be codified at 40 C.F.R. pts. 60, 72 & 75).

256 Interview with Jim Hecker I, *supra* note 2.

VII. POLITICS

According to Hecker and Lovett, the political climate has significant effects on the campaign to abolish mountaintop coal mining.[257] This section examines how politics in Congress, the Executive, and administrative agencies affect the campaign.

A. Congress

Hecker and Lovett have found that political support for the campaign on a national level is difficult.[258] Hecker believes there has been political stalemate in government for the last fifteen years on major environmental issues, evidenced by the fact that there has not been any major reauthorizations of environmental statutes since the 1990 Amendments to the Clean Air Act.[259] Hecker does not foresee this changing unless a strong pro-environment President and Congress are elected simultaneously.[260] Lovett does acknowledge there are a few members of Congress that are sympathetic to the cause, but none are from the Appalachian region.[261] In fact, running a political campaign against the coal industry in the Appalachian region is an election failure guarantee.[262] Even democratic senators and representatives from the region are at least sympathetic to industry concerns, and in some cases active supporters, like Democratic Senator Robert Byrd of West Virginia.[263]

However, when asked about the most recent midterm elections and the shift to a Democratic Congress, Hecker and Lovett agree the change definitely will not hurt the campaign. Similarly, Arthur Bryant comments, "I think [the potential for success in mountaintop removal litigation] is better after the election than it was before it."[264] Lovett suggests that the election of real importance will be the 2008 presidential election, which will usher in a new administration that is hopefully receptive and willing to make progress on the issue.[265]

B. Executive Branch

The executive branch of government has a particularly significant impact on the movement and environmental issues in general. Lovett speculates that anything positive Congress tries with regard to coal mining

257 *Id.*

258 *Id.*

259 *Id.*

260 *Id.*

261 Interview with Joe Lovett, *supra* note 29.

262 *Id.*

263 *See* Francis X. Clines, *With 500 Miners as a Chorus, Byrd Attacks Court Ruling*, N.Y. TIMES, Nov. 10, 1999, at A18; *see also, e.g.*, Robert C. Byrd, U.S. Senator, Maximizing the Use of Our Energy Resources, http://byrd.senate.gov/issues/byrd_energy/byrd_energy.html (last visited July 15, 2007) (highlighting the prominent role of coal in his vision of future energy policy).

264 Interview with Arthur Bryant, *supra* note 48.

265 *Id.*

would be vetoed by President Bush.[266] Indeed, it is estimated the coal industry delivered over 3.6 million dollars to the Bush campaign in the 2000 presidential elections.[267]

Secondly, the Executive determines the position of administrative agencies through appointments. According to Lovett,

> People don't understand how important the President and his [or her] administration are. His [or her] appointments to agencies set a tone for rulemaking and enforcement of laws . . . [t]he standard set by the current President's appointees is to blow off enforcing the laws and otherwise create rules that obfuscate the purpose of the statutes.[268]

Since President Bush was elected, Hecker and Lovett have struggled with an administration that is unwilling to urge state action addressing the environmental problems caused by mountaintop removal coal mining, especially in areas where states have primacy.[269] Federal oversight in the current administration is strongly supportive of the coal industry.[270]

Furthermore, the executive becomes critical in appointments to the federal judiciary over the long-term. The Republican administrations over the past twenty-five years and appointments from these administrations have transformed the judiciary into a much more conservative branch. For instance, in the Fourth Circuit's refusal to reconsider its decision in *Ohio Valley Environmental Coalition v. Bulen*, the five judges who chose not to disturb the panel's decision were all conservative Republican appointees while the three who voted to rehear it were Democratic appointees.[271]

Overall, however, Hecker and Lovett agree the President's political affiliation has a limited impact on mountaintop mining cases.[272] In the early years of the campaign, achieving progress in the democratic Clinton administration was also a struggle. Hecker and Lovett negotiated for months with the Clinton administration and were told discussions made it all the way up to Vice President Al Gore, but they were still unable to strike a deal.[273] However, Lovett acknowledges that "looking back on it now, the Clinton years were comparatively awesome for advancing the agenda."[274] What has followed during the Bush administration has been a "complete collapse of any effort to effectively regulate the coal mining industry and apply the laws that are on the books."[275] Similarly, Hecker notes that while

266 Interview with Joe Lovett, *supra* note 29.

267 Nyden, *supra* note 200.

268 Interview with Joe Lovett, *supra* note 29.

269 *Id.*

270 *See* Joby Warrick, *Appalachia is Paying Price for White House Rule Change*, WASH. POST, Aug. 17, 2004, at A1 (discussing "key changes to coal-mining regulations" proposed and enacted by the Bush Administration that "ease bureaucratic burdens for the coal industry").

271 429 F.3d 493, 505 (4th Cir. 2005); *see* Alliance for Justice, *supra* note 20.

272 Interview with Joe Lovett, *supra* note 29.

273 Interview with Jim Hecker I, *supra* note 2.

274 Interview with Joe Lovett, *supra* note 29.

275 *Id.*

negotiations with the Clinton administration were fruitless, it is impossible even to commence discussion with the Bush administration because it is "like negotiating with the coal industry."

The executive branch also has the ability to initiate rulemaking that can undermine the attorneys' goals. Prior to the 2006 elections, Hecker was concerned the executive branch would attempt to preclude citizen suits,[276] as it has attempted to preclude suits for tort damages. He notes citizen suits could be precluded simply by changing the language of the preclusion provision in the CWA to completely bar citizen suits where an agency had taken any administrative action. Such a preclusion provision that barred citizen suits where any agency has taken action could prevent citizen enforcement of CWA permits. Under that scenario, citizen suits would be precluded if an agency took even *de minimus* action such as writing a letter expressing interest in investigating a mining permit.[277] However, Hecker believes enough Republicans constituents care about the environment to prevent President Bush and Congress from gathering the political support they need to gut the law.[278]

C. Agencies

Government agencies have also generally been a source of frustration to the campaign, although not universally.[279] Obviously, the agencies that are defendants in the litigation are adversaries. However, Lovett contends that executive agencies used to be more helpful. He explains that under the Clinton administration, officials in the Department of Justice and EPA felt guilty about the destruction that unregulated and illegal mining was causing.[280] Hecker and Lovett also note that the United States Fish and Wildlife Service and EPA have traditionally supported their cause.[281] Unfortunately, they are outnumbered by the Corps, OSM, and the State of West Virginia.[282]

Hecker and Lovett still have some allies within the agencies, although it is difficult to find them. For example, Hecker points out that some scientists and lower level staff members within the agencies understand the science is on the attorneys' side.[283] Hecker notes the attorneys can utilize these allies, as one of the most effective arguments in mountaintop removal litigation is using the government's own documents against them.[284]

However, Lovett posits that the directors who manage these agencies, as executive appointees, have always been politically motivated.[285] He views

276 *Id.*

277 *See* Ark. Wildlife Fed'n v. ICI Americas, Inc., 842 F. Supp. 1140 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376 (8th Cir. 1994), cert. denied 513 U.S. 1147 (1995).

278 Interview with Jim Hecker I, *supra* note 2.

279 Interview with Joe Lovett, *supra* note 29.

280 *Id.*

281 Interview with Jim Hecker I, *supra* note 2.

282 *Id.*

283 *Id.*

284 *Id.*

285 Interview with Joe Lovett, *supra* note 29.

much of the senior management of these agencies, especially under the Bush administration, as corrupt and beholden to industry and having little regard for the environment or the citizens who suffer from irresponsible industry practices.[286]

So important are the effects of politics that, following the elections in 2004, Lovett considered shifting his strategy away from litigation to candidate support and recruitment.[287] While he ultimately concluded litigation was his best chance to further the movement, he is still open to working with political candidates that run on an environmentally friendly platform.[288]

VIII. POLICY

A comprehensive understanding of the policies associated with coal mining is a very useful and necessary part of Lovett's strategy.[289] While he acknowledges this understanding is not a condition for success, he feels it is important to have both lawyers and policy analysts involved because they come at the problem from different perspectives and provide solutions their counterparts would otherwise never see.[290]

A. Earthjustice: Joan Mulhern

Joan Mulhern, Senior Legislative Counsel for Earthjustice in Washington, D.C., is an important participant on the policy and legislative side of the campaign. Mulhern is an expert on environmental law and policy, particularly issues involving the CWA.[291] Mulhern works to ensure the laws protecting the environment are strongly worded and that pro-environment court rulings are not overturned by legislative riders, other bills, or administrative rulemaking.[292] To this end, she organizes members of Congress, national environmental groups, and other public policy organizations, focusing most of her work on CWA issues.[293]

Mulhern was aware of the harms of mountaintop mining generally, but became particularly interested when Hecker and Lovett received their first big decision in October 1999 in *Bragg v. Robertson*.[294] She explains that every time there is a pro-environment victory in court, there is a response on the legislative and policy side which must be countered.[295] For example, the legislative response to *Bragg* was Senator

286 *Id.*
287 *Id.*
288 *Id.*
289 *Id.*
290 *Id.*
291 Interview with Joan Mulhern, *supra* note 19.
292 *Id.*
293 *Id.*
294 54 F. Supp. 2d 653 (S.D. W.Va. 1999).
295 Interview with Joan Mulhern, *supra* note 19.

Byrd's proposed amendment to the appropriations bill that would have exempted mountaintop removal and valley fills from the CWA and Buffer Zone Rule under the Surface Mining Law.[296] Senator Byrd's rider was a major CWA exemption and caught Mulhern's attention. Hecker and Lovett needed a legislative strategy and Mulhern was able to tackle this important aspect of the campaign. Since then, Mulhern has been very involved with the policy and legislative aspects of the mountaintop removal campaign and has recruited a number of environmental groups with the goal of creating a national policy presence.[297]

Mulhern's legislative and policy efforts focus on the valley fills and the streams they bury.[298] She states "[t]here are currently no laws that ban stripping the mountains of vegetation or blowing them up, but it is illegal to bury streams, and this is what people have been ignoring. Agencies have simply ignored laws saying you can't dump waste from the mountaintop mines on the streams."[299] Some of the mines are ten to twenty square miles in size and one mine alone had twenty-seven valley fills associated with it, burying eight miles of stream. The laws could be stronger, but if current statutes on the books are enforced, mountaintop mining would be severely curtailed.[300]

Mulhurn believes the mountaintop removal issue is currently at a stalemate in Congress.[301] Due to the current political climate, Mulhern is taking a defensive strategy of making sure the laws are not changed for the worse, rather than working to improve them. In addition to stopping Senator Byrd's rider in the House, Mulhern has been successful in holding off any legislative effort to exempt mountaintop removal from the CWA and other laws for the past six years, and views this as a great accomplishment by itself.[302] She hopes this success will continue until a more favorable administration and Congress returns.

Mulhern primarily focuses her efforts on the House of Representatives, where she generally finds more support.[303] This is perhaps because House members do not deal directly with the powerful, pro-coal Senator from West Virginia, Robert Byrd.[304] Her strategy in lobbying politicians is to aim for representatives from districts outside the region because she believes virtually all politicians from central Appalachia support the coal industry and their political livelihood depends on it.[305] Mulhern's objective in lobbying is to show that the practice of mountaintop

296 145 CONG. REC. S14781-01 (1999); *see also* David Hess & Gail Gibson, *Budget Deal being held up in Senate*, LEXINGTON HERALD-LEADER, Nov. 19, 1999, *available at* http://www.biology.eku.edu/kos/mcconnell.htm.

297 Interview with Joan Mulhern, *supra* note 19.

298 *Id.*

299 *Id.*

300 *Id.*

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.*

305 *Id.*

mining is unfairly destroying a part of the country and violating the law. She stresses that "coal companies should be forced to follow the law like other industries."[306] Mulhern's ultimate legislative goal would be to have Congress go on record in some way against mountaintop coal mining, whether it occurs via legislation or restrictions on practices that violate the CWA.[307] This will take a combination of legislation, litigation, and, most importantly, local organizing and national public education on the issue.[308] She feels public awareness is the key to stopping mountaintop coal mining, claiming, "if people knew about this on the level of ANWR [Arctic National Wildlife Refuge], this wouldn't be happening."[309]

Mulhern coordinates her policy work with Hecker and Lovett; they discuss which and when the next cases are to be filed and the potential policy implications for each of the cases. They work collectively to oppose negative rulemaking and legislative efforts. Initially, they focused on legislative responses to favorable court rulings like Senator Byrd's attempt in 1999 to exempt valley fills from the CWA and buffer zone rules. But, they now focus primarily on opposing rulemaking by the Bush Administration designed to take away citizens' legal tools.[310] Whenever there is a proposed rule, Lovett, Hecker, and Mulhern work together to write and submit comments. Mulhern has been very successful; her comments and organizational efforts spurred over fifteen environmental groups and over 100,000 additional entities and individuals to comment in opposition to the proposed buffer zone rule changes.[311]

B. Work with Other Organizations

Because the environmental law community is small and close knit, Hecker and Lovett often work with other environmental and public interest organizations to develop policy.[312] From his years of work in the field, Hecker knows many individuals and groups working in the area of environmental law, and utilizes this networking resource whenever possible.[313] They also work closely with local grassroots citizen groups to form coalitions like Stop Mountaintop Removal, which includes Appalachian Center for the Economy and the Environment, Earthjustice, Coal River Mountain Watch, West Virginia Highlands Conservancy, and the Ohio Valley Environmental Coalition.[314]

306 *Id.*
307 *Id.*
308 *Id.*
309 *Id.*
310 *Id.*
311 *Id.*
312 Interview with Jim Hecker I, *supra* note 2.
313 *Id.*
314 *See* Stop Mountaintop Removal, http://www.stopmountaintopremoval.org/who-we-are.html (last visited July 15, 2007).

IX. PUBLICITY

A. Media

Other than the courts, the media is perhaps the greatest ally and asset in the movement to end mountaintop coal mining. Hecker, Lovett, and Mulhern acknowledge that, without media attention on the litigation campaign, much of the grassroots activism and local support would have never started.[315]

One common theme in publications on mountaintop removal mining is to show graphic pictures of the destruction caused by mountaintop coal mining.[316] According to Lovett, showing photos of the devastation at mountaintop removal mines is important for two reasons.[317] First, the mountaintop mines are not visible to the public passerby. The mines are usually hidden away from roads and highways, so the only way to see the damage is via a small plane or satellite photography. Second, photos are important because the destruction is so visually stunning. The shocking images of blasted mountains, buried streams, and decimated forests support Lovett's claim that "the story sells itself."[318] Many viewers of these images are in disbelief that such an environmental calamity could be occurring in the United States and are immediately convinced that something must be done.

Lovett and Hecker have frequently explained their advocacy goals and the harms of mountaintop coal mining to media outlets.[319] The Appalachian Center's work has been featured in hundreds of news stories and editorials in national, regional, and local newspapers, and has appeared on *60 Minutes*, in the *New York Times*, and other widely distributed news sources.[320] The positive media attention has helped to shift national and even regional public opinion decidedly on the attorneys' side. The media has been so helpful that Hecker and Lovett believe mining companies no longer allow media to enter mine sites.[321]

B. Public Justice Outreach & Education

Hecker and Lovett also use a variety of other approaches to increase awareness of their campaign. In addition to educational resources distributed through the Public Justice website and quarterly newsletter, Hecker frequently speaks at Public Justice's annual meeting, which is attended by several hundred lawyers.[322] He also is often a guest lecturer in

315 Interview with Joe Lovett, *supra* note 29.

316 *Id.*

317 *Id.*

318 *Id.*

319 *Id.*; Interview with Jim Hecker I, *supra* note 2.

320 *Id.*

321 Interview with Joe Lovett, *supra* note 29.

322 *Cf.* Press Release, Noted California Attorney Alan R. Brayton Named President of the TLPJ Foundation at Annual Meeting in Seattle (July 16, 2006), *available at*

law schools and in front of other legal institutions like the American Bar Association.[323]

X. CONCLUSION

Some grassroots activists believe the long-range goal of the coal industry is to make life so unlivable in the region that people will leave, some with buyout checks in hand, the rest without. Without anybody left to witness or care, the coal companies would be able to blast away one of America's most diverse, rich, and delicate ecosystems with no repercussions. Attorneys Joe Lovett, Jim Hecker, and Joan Mulhern are working to make sure this never happens. While the campaign for change has been frustrating and discouraging at times, these attorneys are committed for the long-haul.

The attorneys' legal strategy has proven successful, achieving precedent-setting rulings at the federal district court level. Their litigation effort has spurred the formation of local grassroots organizations and sparked regional and national public interest in the harms of mountaintop removal. The success of the litigation is a manifestation of their determination and perseverance, along with their skills as trial lawyers and legal scholars.

The campaign is also made possible by the continued support of Public Justice. Founded and financed by trial lawyers, Public Justice is one of the nation's preeminent public interest law firms. Both the attorneys and Public Justice strive for success and remain committed to effecting positive change as the litigation campaign moves forward. Hopefully their hard work and determination will be rewarded with the elimination of mountaintop removal coal mining. The natural splendor and cultural heritage of central Appalachia deserve nothing less.

http://www.tlpj.org/pr/alan_brayton_president_071706.htm (TLPJ held its latest annual meeting in Seattle, WA, on July 16, 2006. TLPJ has over 3,500 members.).

323 Interview with Jim Hecker I, *supra* note 2.